(1)

Supreme Court, U.S.
FILED

011079 JAN 18 2002

No. _____ OFFICE OF THE

IN THE

Supreme Court of the United States

SHEILA K. MONTGOMERY,
Petitioner,

v.

STATE OF MARYLAND et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

DEBORAH A. JEON
American Civil Liberties Union Foundation of Maryland
100 North Liberty Street
Centreville, MD 21617

ROBIN R. COCKEY
Cockey, Brennan & Maloney, P.C.
116 W. Main Street
Salisbury, MD 21801

JONATHAN R. SIEGEL
Counsel of Record
Professor of Law
George Washington University Law School
2000 H St., N.W.
Washington, DC 20052
(202) 994-7453

1388

QUESTIONS PRESENTED

1. Whether a state defendant that raises the defense of state sovereign immunity, but then expressly withdraws it, is thereafter barred from reasserting immunity.

2. Whether a complaint that generally alleges a violation of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq., is sufficient to withstand a motion to dismiss, even though a court believes that the complaint does not allege sufficient specific facts to show a violation of the act, and even though the complaint contains inconsistent allegations relating to an alternative claim.

PARTIES TO THE PROCEEDING

Petitioner Sheila K. Montgomery was the plaintiff in the proceedings below.

Respondents, who were defendants in the proceedings below, are the State of Maryland, Maryland's Department of Public Safety and Correctional Services, Division of Corrections, Warden Robert Kupec, and Deputy Warden George Kaloroumakis.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
A. Facts 2
B. Proceedings in the District Court 3
C. The Appeal 4
REASONS FOR GRANTING THE PETITION 7
I. THE STATE SOVEREIGN IMMUNITY ISSUE 9
A. The Ruling of the Court of Appeals Concerns an Important Issue of Federal Law 9
B. The Fourth Circuit's Ruling Conflicts with Decisions by Other Federal Courts of Appeals 13
C. The Court of Appeals' Ruling is Incorrect 15
II. THE PLEADING ISSUE 21
A. The Ruling of the Court of Appeals Concerns Important Issues of Federal Law 22
B. The Decision of the Court of Appeals Conflicts with the Decisions of Other Courts of Appeals 23
C. The Decision of the Court of Appeals is Incorrect 26
CONCLUSION 29
APPENDIX 1a

TABLE OF AUTHORITIES

Cases: Page

Alden v. Maine,
527 U.S. 706 (1999) 9, 10
American Nurses' Ass'n v. Illinois,
783 F.2d 716 (7th Cir. 1986) 23, 25
Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico,
270 F.3d 17, 26-29 (1st Cir. 2001) 11, 13
Arguello v. Conoco, Inc.,
207 F.3d 803, 813 (5th Cir. 2000), *cert. denied*,
531 U.S. 874 (2000) 25
Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 9
Bodine Produce, Inc. v. United Farm Workers Organizing Committee,
494 F.2d 541, 561-62 (9th Cir. 1974) 25
Branson School Dist. RE-82 v. Romer,
161 F.3d 619, 631 (10th Cir. 1998) 18
Chittister v. Department of Community and Economic Development,
226 F.3d 223, 227 (3d Cir. 2000) 12, 13
Clark v. Barnard,
108 U.S. 436 (1883) 17
College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 9, 10, 11
Conley v. Gibson,
355 U.S. 41, 47-48 (1957) 22
Dellmuth v. Muth,
491 U.S. 223 (1989) 9

Edelman v. Jordan,
415 U.S. 651 (1974) 9, 15, 17
Ex parte Young,
209 U.S. 123 (1908) 6
Fleming v. AT&T Information Services, Inc.,
878 F.2d 1472 (D.C. Cir. 1989) 25
Florida Dept. of State v. Treasure Salvors, Inc.,
458 U.S. 670 (1982) 9
Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,
527 U.S. 627 (1999) 9, 10
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 17, 20
Green v. Mansour,
474 U.S. 64 (1985) 9
Gunter v. Atlantic Coast Line R. Co.,
200 U.S. 273 (1906) 16
Henry v. Daytop Village, Inc.,
42 F.3d 89 (2d Cir. 1994) 25
Hill v. Blind Industries & Services of Maryland, 179 F.3d 754 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000) 11, 12, 13, 16, 17, 18
Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989) 9
Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 9
In re Burke,
146 F.3d 1313 (11th Cir. 1998) 11, 13, 14
In re SDDS, Inc.,
225 F.3d 970 (8th Cir. 2000), *cert. denied*,
121 S. Ct. 1733 (2001) 11, 13, 14

Independent Enterprises Inc. v. Pittsburgh Water & Sewer Authority, 103 F.3d 1165 (3d Cir. 1997) 26
Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000) 12, 13
Lapides v. Board of Regents of University System of Georgia, 251 F.3d 1372 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 456 (2001) 8, 12, 14, 29
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 22, 27
Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985) 25
Newfield House, Inc. v. Massachusetts Dep't of Pub. Welfare, 651 F.2d 32 (1st Cir. 1981) 19
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 9
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 9
People of Porto Rico v. Ramos, 232 U.S. 627 (1914) 16
People of Porto Rico v. Rosaly, 227 U.S. 270 (1913) 15
Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 15
Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983) 15
Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916) 15, 16
Rodriguez-Suris v. Montesinos, 123 F.3d 10 (1st Cir. 1997) 26

Sao Vicente v. Transportes Maritimos do Estado,
281 F. 111 (2d Cir. 1922), *cert. dismissed*, 260 U.S. 151 (1922) 17
Scheuer v. Rhodes,
416 U.S. 232 (1974) 22
Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 9, 10
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 19
Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226 (10th Cir. 1999) 11, 12, 14
Swierkiewicz v. Sorema, N.A.,
2001 WL 246077 (2d Cir. 2001)
cert. granted, 122 S. Ct. 23 (2001) 8, 22, 23, 29
Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 9, 10
Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468 (1987) 9
Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 9
Wisconsin Dep't of Corrections v. Schacht,
524 U.S. 381 (1998) 15, 17, 18, 19, 20

Constitutional Provisions:

U.S. Const.:
Amend. XI ..... *passim*
U.S. Const.:
Amend. XIV 3, 10

Statutes and Rules:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3
28 U.S.C. § 2403(a) 1
Family and Medical Leave Act of 1993,
29 U.S.C. § 2601 et seq. ..... *passim*
29 U.S.C. § 2612(a)(1)(D) 2
29 U.S.C. § 2614(a)(1)(A), (B) 2, 26
42 U.S.C. § 1983 22
Title VII of the Civil Rights Act of 1964,
42 U.S.C. 2000e 24
Department of Labor regulations,
29 C.F.R. § 825.215 1
29 C.F.R. § 825.215(a) 26
29 C.F.R. § 825.216 1
Fed. R. Civ. P.:
Rule 8(e)(2) 25, 28
Rule 12(b)(1) 3
Rule 12(b)(6) 2, 4, 19, 25, 27
Supreme Court Rule 29.4(b) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sheila K. Montgomery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Appendix ("App.") A, is reported at 266 F.3d 374. (App. 1a). The opinion of the district court, Appendix B, is unreported. (App. 15a).

JURISDICTION

The court of appeals entered its judgment on September 26, 2001. (App. 1a). The court of appeals denied a timely petition for rehearing on October 23, 2001. (App. 19a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The court of appeals held the Family and Medical Leave Act to be unconstitutional insofar as the Act purports to abrogate state sovereign immunity from suit. There was no formal certification of the issue under 28 U.S.C. § 2403(a), but the United States learned of the action and participated in the appeal as amicus curiae. Section 2403(a) may apply and the notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions, statutes, and regulations are set forth in the Appendix. These provisions are:

United States Constitution, Amendment XI.

Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2612(a), 2614(a), 2615(a), and 2617(a).

Department of Labor regulations, 29 C.F.R. §§ 825.215, .216.

STATEMENT OF THE CASE

A. Facts

Because this case was ultimately dismissed on the basis of respondents' motion under Federal Rule of Civil Procedure 12(b)(6), the following statement assumes the facts pleaded in petitioner's complaint to be true.

Petitioner is an employee of the state of Maryland. She is employed by Maryland's Department of Public Safety and Correctional Services, Division of Corrections, at the Department's Eastern Correctional Institution ("ECI"), a prison. Prior to the facts giving rise to this case, petitioner was the principal administrative aide to the Warden of ECI.

On September 22, 1999, petitioner took a leave of absence in accordance with the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq. ("FMLA"), so that she could have necessary time to recuperate from surgery. The FMLA entitles eligible employees to take up to 12 weeks of leave during a 12-month period for certain, specified reasons, including "because of a serious health condition" that prevents the employee from working; upon return from such leave, an employee must be restored to the employee's previous position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1)(A), (B).

Petitioner returned to work on November 8, 1999. Upon her return to work, petitioner was informed that she was no longer the principal administrative aide to the Warden. Instead, she was now a secretary in the prison's maintenance department. Although her salary and benefits did not change, petitioner's new daily activities were "substantially different from and inferior to her duties and responsibilities in her former position as an administrative aide in the Warden's office, where she acted in a truly 'administrative' capacity, assisting the chief

executive of the facility in the performance of the Warden's functions." Complaint, ¶14.

B. Proceedings in the District Court

Petitioner filed this action in the United States District Court for the District of Maryland. She named as defendants the State of Maryland; the Department; ECI's Warden, Robert Kupec; and its Deputy Warden, George Kalorour akis.

Petitioner's complaint alleged the facts contained in the previous section. It also alleged certain details regarding petitioner's current and previous jobs. For example, petitioner alleged that in her previous job she was "the Warden's personal liaison with staff members at ECI, with DOC headquarters and with outside agencies." Complaint, ¶7. She alleged that her previous job entailed composing written communications for the Warden and maintaining his calendar. *Id.* Now, petitioner alleges, she performs only the "simplest, most menial of clerical functions," such as answering the phone and taking messages. Instead of composing written communications, she merely types them. Complaint, ¶14.

Petitioner's complaint contained two counts. Count I asserted that the respondents' actions violated the Due Process Clause of the United States Constitution. Complaint, ¶17. Count II asserted that the respondents had violated the petitioner's rights under the FMLA "[b]y refusing to reinstate [her], following her FMLA-protected leave, to a position the same as or substantially equivalent to" her former position. Complaint, ¶20. Petitioner sought a declaration that respondents had violated the FMLA, an injunction requiring them to restore her to her former position, compensatory damages, costs, fees, and other appropriate relief. Federal jurisdiction was based on 28 U.S.C. § 1331.

Respondents filed a motion to dismiss petitioner's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and

12(b)(6). With regard to both counts of the complaint, respondents asserted that the complaint failed to state a claim upon which relief could be granted and that the defendants had sovereign immunity from petitioner's claims under the Eleventh Amendment to the United States Constitution. See Memorandum in Support of Motion to Dismiss 7-16.

Subsequently, however, the state, as the court of appeals later put it, "pursued . . . what might be described as an erratic approach to its own Eleventh Amendment defense." (App. 5a). Before petitioner responded to the motion to dismiss, respondents filed a letter with the district court withdrawing the defense of sovereign immunity as to Count II of the complaint. The letter expressly stated:

> The purpose of this letter is to withdraw, on behalf of all Defendants, the 11th Amendment immunity defense to Count II of the Complaint.

(App. 32a). Petitioner then responded to the remaining defenses in the motion to dismiss. *See* Opposition to Motion to Dismiss.

In ruling on the motion, the district court, notwithstanding the respondents' withdrawal of their assertion of state sovereign immunity, took up the issue of immunity *sua sponte*. The district court determined that the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity, and it dismissed Count II of the complaint as to all defendants on that basis. (App. 15a, 18a). The district court also dismissed Count I of the complaint for failure to state a claim upon which relief could be granted. (App. 18a).

C. The Appeal

Petitioner appealed the district court's ruling to the United States Court of Appeals for the Fourth Circuit with regard to Count II of the complaint. (Petitioner abandoned the first count

of the complaint.) Petitioner argued that when a state defendant expressly withdraws the defense of sovereign immunity, a federal district court must respect the state's decision and may not consider the immunity defense. *See* Opening Brief for the Appellant 12-13. The respondents, in their appellate brief, defended the district court's power to raise the issue of immunity *sua sponte*. *See* Brief of Appellees 8-12. Petitioner also argued that the district court had erred in dismissing the claims against the individual respondents. *See* Opening Brief for the Appellant 28-31.

On appeal, the respondents, as the court of appeals put it, "reversed course" again. (App. 5a). At oral argument, respondents' counsel informed the court of appeals that the respondents *were* asserting sovereign immunity from suit. (App. 5a). On the day after argument, respondents' counsel filed a letter to "confirm the position . . . that the State appellees assert that the Eleventh Amendment bars the plaintiff's claim filed under the Family and Medical Leave Act." (App. 33a).

The court of appeals subsequently received supplemental briefing from both sides regarding the effect of the respondents' assertion of sovereign immunity at oral argument.[1] Petitioner argued that the respondents' previous withdrawal of the immunity defense, while the case was in district court, barred

---

[1] Respondents claimed that their original appellate brief asserted the defense of state sovereign immunity even prior to oral argument. *See* Supplemental Brief of Appellees at 1-2. There is a dispute as to whether this is true. In petitioner's view, however, this dispute is immaterial. As will be argued in this petition, respondents' withdrawal of the immunity defense in district court precluded them from raising it at any subsequent stage of the proceedings. To the extent it might matter whether respondents asserted the defense of immunity in their appellate brief, petitioner submits that they did not. Instead, they made the different argument that the district court was authorized to consider sovereign immunity *sua sponte*.

respondents from reasserting the defense on appeal. *See* Supplemental Brief for the Appellant 6-21.

The court of appeals then rendered its opinion. The court agreed with petitioner that a district court errs in considering the defense of state sovereign immunity *sua sponte* after a state defendant "affirmatively and unequivocally" withdraws the defense. (App. 4a). The court said "in a federal system with dual sovereigns, one sovereign must treat the other with a measure of respect," and "[t]his goal is undermined when a federal court imposes on a state a legal argument that the state first advanced but then affirmatively withdrew." (App. 5a).

The court went on, however, to hold that the respondents were empowered to reassert the defense of sovereign immunity on appeal notwithstanding their previous withdrawal of the defense. The court noted that "circuit precedent allows the Eleventh Amendment to be raised for the first time on appeal, regardless of whether the case was resolved on the pleadings . . . or upon a grant of summary judgment." (App. 6a). The court also held that, as a matter of Maryland state law, the state's Attorney General may not waive sovereign immunity on behalf of the state. (App. 7a). The court therefore permitted the respondents to assert immunity.

Having done so, the court held that sovereign immunity barred petitioner's claim against the state under the FMLA. The FMLA, the court held, does not validly abrogate the sovereign immunity of the states. (App. 9a).

The court held that immunity did not bar petitioner's claims against the individual respondents for an injunction reinstating her to her former position. These claims, the court held, could proceed under *Ex parte Young*, 209 U.S. 123 (1908). (App. 12a). The court held, however, that Count II of petitioner's complaint was properly dismissed because it failed to state a claim upon which relief could be granted. The court noted that petitioner has not lost any pay or benefits. (App. 13a).

Focusing on the specific differences alleged in petitioner's complaint between her current and previous jobs, the court held that the alleged differences go only to the "de minimis or intangible, unmeasurable aspects of the job" and do not state a cognizable claim under the FMLA. (App. 12a).

Finally, the court noted that petitioner's complaint also alleged that the respondents had transferred her to her new position in retaliation for her filing of a grievance that was unrelated to her FMLA leave. For this reason as well, the court held that petitioner's complaint failed to state a claim under the FMLA. (App. 14a).

REASONS FOR GRANTING THE PETITION

This case involves two important issues: one concerning waiver of state sovereign immunity and one concerning fundamental principles of pleading in the federal system.

1. While this case was in district court, the respondents initially raised the defense of state sovereign immunity, but then *expressly withdrew it.* The court of appeals should have held that this action barred the respondents from subsequently reasserting immunity. The court's decision to permit the respondents to assert immunity on appeal conflicts with decisions of other federal courts of appeals; it disregards the most relevant, recent decisions of this Court; it contradicts the rule that state sovereign immunity cannot be asserted once waived; and it will promote gamesmanship and waste of federal judicial resources by state defendants.

2. The court of appeals' decision also disregards the fundamental principle of "notice pleading" that underlies the rules of pleading in the federal system. It raises an important question regarding how to interpret a complaint that contains both general and specific allegations. Petitioner's general allegations that respondents refused to restore her to a

substantially equivalent position, Complaint, ¶20, and that her duties in her new job are "substantially different from and inferior to her duties and responsibilities in her former position[,]" Complaint, ¶14, plainly state a claim under the FMLA. The court of appeals rejected petitioner's complaint because it also pleads additional details regarding petitioner's new job, and the court believed that these details were not by themselves sufficient to state a claim. However, as other courts of appeals have recognized, a complaint's sufficient, general allegations may not be ignored simply because the complaint also contains specific allegations that a court believes are by themselves insufficient to state a claim. In addition, the court of appeals clearly erred in rejecting petitioner's complaint because it contained an alternative, inconsistent allegation; such allegations are expressly permitted by the federal rules.

Certiorari should be granted because, as to each issue, the court of appeals rendered a ruling that concerns an important issue of federal law, that conflicts with decisions of other federal courts of appeals, and that is incorrect.

In addition, as to each issue, the ruling is related to a pending case in which this Court has already granted certiorari. *See Lapides v. Board of Regents of University System of Georgia*, 122 S. Ct. 456 (2001) (No. 01-298) (state sovereign immunity issue); *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 23 (2001) (No. 00-1853) (pleading issue). The results in these cases could significantly affect the proper decision of the present case. If this Court does not grant certiorari, it should hold this case pending the results in *Lapides* and *Swierkiewicz*.

I. THE STATE SOVEREIGN IMMUNITY ISSUE

Certiorari Should Be Granted So That this Court May Determine Whether a State Defendant That Raises a Claim of Sovereign Immunity, but Then Expressly Withdraws It, Is Thereafter Barred from Asserting Immunity.

A. The Ruling of the Court of Appeals Concerns an Important Issue of Federal Law

The court of appeals held that a state defendant may raise the defense of state sovereign immunity on appeal even after *expressly withdrawing* the defense in district court. This ruling raises an important question of federal law.

The general issue of the sovereign immunity of state defendants from suits under federal law is, of course, an important issue that has occupied this Court since the founding of the Nation. It has been much on the Court's docket in recent decades.[2]

In recent years, this Court has steadily diminished the set of

---

[2] For just some of the recent decisions, see *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468 (1987); *Green v. Mansour*, 474 U.S. 64 (1985); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Edelman v. Jordan*, 415 U.S. 651 (1974).

circumstances in which federal courts may entertain suits against state defendants. This important trend began with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which held that Congress may not abrogate state sovereign immunity when acting pursuant to its powers under Article I of the Constitution. Several subsequent cases further limited suits against states. This Court held that private parties may not avoid state sovereign immunity by suing in state court rather than in federal court, *Alden v. Maine*, 527 U.S. 706 (1999); it held that a state does not implicitly consent to suit by engaging in activity regulated by federal law, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); and it took a limited view of Congress's powers under section 5 of the Fourteenth Amendment, which do permit Congress to abrogate state sovereign immunity, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

As the set of circumstances in which states may be sued diminishes, the remaining circumstances in the set take on increased importance. At the moment, it would appear that states may be sued only (1) by the United States or by other states, (2) when Congress, acting pursuant to its powers under section 5 of the Fourteenth Amendment, expressly authorizes suit by private parties, and (3) when a state consents to suit or otherwise waives its immunity. *See Alden*, 527 U.S. at 755-57; *College Savings Bank*, 527 U.S. at 675-76.

Because these appear to be the only remaining categories of cases in which federal courts may entertain suits against states, it is vitally important that the boundaries of each category be fully understood. The importance of such understanding may explain why this Court has recently taken cases to explore each category: *Florida Prepaid*, *supra*, considered the limits of Congress's power under section 5; *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000),

concerned the question of what constitutes a suit by the "United States" (although the case was ultimately decided on a different ground); and *College Savings Bank*, *supra*, explored the boundaries of "consent" to suit.

The remaining, least explored category is that of cases in which a state *waives* its sovereign immunity from suit. This category is obviously related to the "consent" category explored in *College Savings Bank*, but that case considered only whether a state generally consents to suit by engaging in federally regulated activity. What remains to be determined by this Court is when a state waives its immunity from suit in particular cases by actions taken in the course of litigation.

The importance of answering this question is underscored by the numerous, recent cases in which it has arisen. The question has vexed numerous courts of appeals, which have reached conflicting decisions. The Ninth Circuit, for example, has held that a state waives immunity simply by failing to invoke it until the first day of trial, *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754, 756-58 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000), whereas the Fourth Circuit, in the present case, held that immunity is not waived even if the state, after withdrawing the issue in district court, does not reassert it until the case is on appeal. (App. 6a). Numerous other courts of appeals have also considered the question, with conflicting results. *Compare In re SDDS, Inc.*, 225 F.3d 970, 973 (8th Cir. 2000) (waiver occurs when a state makes a general appearance and litigates on the merits), *cert. denied*, 121 S. Ct. 1733 (2001); *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (waiver occurs when a state removes a case from state court to federal court and litigates on the merits); *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 26-29 (1st Cir. 2001) (waiver occurs when a state files a proof of claim in a bankruptcy proceeding); *and In re Burke*,

146 F.3d 1313, 1319-20 (11th Cir. 1998) (same); *with Lapides v. Board of Regents of University System of Georgia*, 251 F.3d 1372, 1378 (11th Cir. 2001) (removal does not give rise to waiver), *cert. granted*, 122 S. Ct. 456 (2001); *Chittister v. Department of Community and Economic Development*, 226 F.3d 223, 227 (3d Cir. 2000) (no waiver even though the case was tried in district court and the state did not raise immunity until the case was on appeal); *and Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816 (6th Cir. 2000) (same).

In light of the need to understand the limits of this remaining category in which suits against states are permitted, and in light of the frequent, conflicting decisions by courts of appeals that this issue has generated, the issue presented by this case is an important one that merits consideration by this Court.

This Court has, indeed, already granted certiorari this Term in a case presenting a question of waiver of state sovereign immunity. *See Lapides v. Board of Regents of University System of Georgia*, 122 S. Ct. 456 (2001) (No. 01-298). *Lapides* concerns the question of whether a state waives its immunity by removing a case from state court to federal court, a question also considered by the Tenth Circuit in *Sutton*.

The present case is importantly related to *Lapides*. Both cases concern the question of whether a state waived its immunity by actions taken in the course of litigation. Both cases also concern the relevance of state law to the determination of this question. The ruling in *Lapides* could easily have considerable influence on the proper decision in this case. Therefore, at a minimum, this Court should hold this case pending the decision in *Lapides*.

Beyond that, however, this Court should grant certiorari in this case regardless of what happens in *Lapides*. Although the cases are obviously related, this case and *Lapides* present distinct, complementary questions concerning the boundaries of the important waiver category. Unlike *Lapides*, the present case

began in federal court. Here, the waiver issue arises, not from the state's removal of the case *to* federal court, but from the state's conduct while the case was *in* federal court. Similar issues were presented in the *Hill*, *SDDS*, *Arecibo*, *Burke*, *Chittister*, and *Kovacevich* cases cited above.

Thus, this case presents a distinct, important, recurring question that has vexed the courts of appeals. It is a good vehicle by which this Court can explore the boundaries of one of the few, remaining categories of cases in which private parties may bring suits against states. This Court should grant certiorari.

B. The Fourth Circuit's Ruling Conflicts with Decisions by Other Federal Courts of Appeals

As mentioned above, the courts of appeals have reached conflicting decisions regarding waivers of state sovereign immunity. Because of its independent importance in guiding this Court's decision as to whether to grant the writ of certiorari, we reiterate that the decision in the present case conflicts with decisions of other courts of appeals.

The Fourth Circuit's decision conflicts with the decision of other circuits on the question of whether a state defendant's actions, taken while a case is in district court, may bar the defendant from subsequently asserting the defense of state sovereign immunity. The Fourth Circuit held that a defendant may assert immunity on appeal regardless of its actions in district court. Other circuits have disagreed with this view.

For example, in *Hill*, *supra*, the state defendant answered the plaintiff's complaint and participated in pre-trial proceedings without mentioning sovereign immunity. *See* 179 F.3d at 756. On the opening day of trial, the defendant asserted sovereign immunity for the first time. *See id.* The Ninth Circuit held that the defendant had waived immunity by not asserting it in a timely fashion. *See id.* at 760-63.

Thus, the Ninth Circuit believes that a defendant's actions in district court, including even a mere failure to raise the immunity defense in a timely fashion, may constitute an irrevocable waiver of the defense. The Fourth Circuit, by contrast, permits defendants to raise the immunity defense belatedly notwithstanding their actions in district court, including even their express withdrawal of the defense. The Fourth Circuit's decision therefore conflicts with the decision of the Ninth Circuit.[3]

The Fourth Circuit also relied on Maryland state law in holding that the state's attorneys may not waive the state's sovereign immunity. (App. 7a). Whether a federal court should consider state law in determining whether a state has waived its immunity in the course of litigation is a frequently recurring issue in these waiver cases, and, again, the Fourth Circuit's decision conflicts with those of other circuits. The Tenth Circuit, for example, held that removal of a case to federal court and litigation of the case's merits creates a waiver notwithstanding a state statute expressly declaring state courts to be the exclusive forum for suits against the state. *Sutton*, 173 F.3d at 1235. The Eleventh Circuit held that a state's filing of a proof of claim in bankruptcy waives immunity notwithstanding a provision in the state's constitution allowing waiver only by act of the state's General Assembly, *Burke*, 146 F.3d at 1317-18, although later, in *Lapides*, *supra*, which is currently before this Court, the Eleventh Circuit relied on state

---

[3] The ruling in the present case also conflicts in principle with the decision of the Eighth Circuit in *SDDS*, *supra*. In that case, the court of appeals held that the defendants' litigation of the case in district court constituted a waiver of state sovereign immunity. The Fourth Circuit, in the present case, held that, notwithstanding anything that occurred in district court, state defendants may assert a defense of sovereign immunity on appeal.

law in holding that no waiver occurred.

This Court should grant certiorari to resolve the conflict between the Fourth Circuit's decision in this case and the decisions of the other courts of appeals cited above.

C. The Court of Appeals' Ruling is Incorrect

The correct rule is that defendants who waive the defense of state sovereign immunity may not assert the defense later. This was the traditional rule applied by this Court well into the twentieth century. Although the rule was temporarily displaced by cases such as *Edelman v. Jordan*, 415 U.S. 651 (1974), it was effectively reinstated by the recent decision in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998). The rule makes good sense; it preserves state sovereign immunity and requires only that the states assert their immunity in an orderly fashion. The conduct of the respondents in this case falls within the rule and bars them from reasserting immunity.

1. This Court's traditional Eleventh Amendment jurisprudence provided that a defendant wishing to assert the defense of state sovereign immunity had to do so in a timely fashion. If the defense was not asserted seasonably, it was waived; once waived, the defense could not be asserted.

Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916), provides a clear example of this rule. In that case, the plaintiff sought a refund of an allegedly illegal tax, which it had paid under protest to the treasurer of Puerto Rico.[4] Plaintiff sued the

---

[4]Puerto Rico is treated as a state for Eleventh Amendment purposes. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 n.1 (1993) (assuming this point *arguendo*); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983) (so holding); *see also People of Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913) ("Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent.").

treasurer in federal court. The defendant answered the complaint, and some other steps were also taken: an amended and supplemental complaint were filed and answered, and a trial date was set. *See id.* at 46-47. Then, eight months after the action was first instituted, the defendant moved to dismiss on the ground that the court lacked jurisdiction because of the defendant's sovereign status. *Id.* at 47.

Even though the defendant had never expressly disavowed immunity, and even though the defendant attempted to assert immunity just eight months into the case, while the case was still in the trial court, this Court briskly denied the defendant's assertion of immunity as untimely. The Court said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction." *Id.* at 47. *Richardson* therefore shows that the traditional waiver rule was quite strong.

Richardson relied on the earlier case of *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914), in which Puerto Rico first intervened as defendant in a case, but later asserted sovereign immunity from suit. This Court rejected the attempt to raise the immunity defense. It said: "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step." *Id.* at 632.

Richardson also relied on *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906), in which the Court said:

> Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily become a party to a cause, and submits its rights for judicial determination, it will be

> bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.

Id. at 284 (citing *Clark v. Barnard*, 108 U.S. 436 (1883)).

Thus, this Court's traditional Eleventh Amendment jurisprudence established that if the defense of state sovereign immunity is not seasonably asserted, it is waived and cannot be asserted later. This rule applied well into the twentieth century. *See Sao Vicente v. Transportes Maritimos do Estado*, 281 F. 111, 115 (2d Cir. 1922) ("The underlying principle of *Clark v. Barnard* has been consistently followed."), *cert. dismissed*, 260 U.S. 151 (1922); *Hill, supra*, 179 F.3d at 760 ("Before 1945, it was generally acknowledged that a state waives its Eleventh Amendment immunity by litigating a case on the merits without timely objecting to the federal court's assertion of jurisdiction.").

2. Some later cases, most notably *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), temporarily led to the implementation of a rule that a defendant could assert the defense of state sovereign immunity at any stage of a litigation, on the theory that the defense went to a federal court's subject matter jurisdiction. *See Edelman*, 415 U.S. at 677-78. This theory, however, has been vitiated by this Court's recent decision in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998). *Schacht* took a different view of the Eleventh Amendment. The Court said: "The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense." *Id.* at 389. Justice Kennedy, in a concurring opinion, expressed doubts about the propriety of permitting states to assert Eleventh Amendment immunity at

any time and suggested that the Court could eliminate unfairness by making Eleventh Amendment jurisprudence "more consistent with our practice regarding personal jurisdiction." *Id.* at 394-95 (Kennedy, J., concurring).

As subsequent lower court decisions have confirmed, *Schacht*'s view of the Eleventh Amendment is incompatible with the view that Eleventh Amendment immunity destroys federal subject matter jurisdiction and may, therefore, be asserted at any time. Rather, *Schacht* reinstates the traditional view of Eleventh Amendment immunity as a defense that a state may choose to assert or not. It therefore follows that *Schacht* reinstates the traditional rule that Eleventh Amendment immunity is waived if it is not seasonably asserted, and cannot be asserted once waived. As the Ninth Circuit observed in *Hill*, *supra*, *Schacht* shows that this Court has "returned to its original understanding of Eleventh Amendment immunity," 179 F.3d at 760, and "[o]nce it is clear that the Eleventh Amendment is not a true limitation upon the court's subject matter jurisdiction, but rather a personal privilege that a state may waive, it is difficult to justify or explain a rule that allows this defense to be invoked at any time in the proceedings." *Id.*

State sovereign immunity should, therefore, be treated as an affirmative defense that is akin to the defense of personal jurisdiction. *See Schacht*, 524 U.S. at 394-95 (Kennedy, J., concurring); *see also Hill*, 179 F.3d at 760; *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998). Again, this rule is simply the reinstatement of this Court's traditional view.

3. This rule makes good sense. Permitting defendants to assert sovereign immunity belatedly—or, even worse, permitting them to withdraw the defense expressly, only to reassert it later, as in this case—is obviously unfair, unjust, and unworthy of sovereign dignity. Permitting such behavior allows defendants to seek the benefit of a favorable judgment while

running no risk from any adverse judgment. *See Schacht*, 524 U.S. at 394 (Kennedy, J., concurring). Such gamesmanship also unfairly wastes the plaintiff's resources, as well as federal judicial resources, since courts may be forced to consider questions related to the merits of a case, only to find those questions mooted by a state defendant's belated assertion of immunity. *See Hill*, 179 F.3d at 758; *Newfield House, Inc. v. Massachusetts Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (1st Cir. 1981) (belated assertion of Eleventh Amendment immunity "would if allowed work a virtual fraud on the federal court and opposing litigants").

By contrast, a rule requiring state sovereign immunity to be asserted in a timely fashion imposes no unfair hardship on states. It is in no way incompatible with sovereign dignity or sovereign prerogatives. It leaves states completely free to decline to answer the suit of private individuals. It requires only that states exercise this prerogative in an orderly way that shows a bare minimum of regard for the legitimate interests of the federal judicial system. *See Hill*, 179 F.3d at 763.

4. The actions taken by respondents in this case constituted a waiver of state sovereign immunity and therefore triggered the rule that a defendant that waives immunity cannot assert it later. The respondents first raised sovereign immunity and then took the affirmative step of expressly withdrawing the defense.

Respondents' withdrawal of the immunity defense left the district court with a motion to dismiss Count II of petitioner's complaint solely on the basis of Federal Rule 12(b)(6). Because a district court may act on a motion to dismiss under Rule 12(b)(6) only if it has jurisdiction over the merits of a case, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88, 93-102 (1998), the respondents, by asking for a 12(b)(6) dismissal and by expressly withdrawing their assertion of immunity, expressly asked the district court to exercise jurisdiction over the merits of the case without regard to the

defense of sovereign immunity. This action shows that the respondents submitted themselves to the jurisdiction of the district court and thus waived their defense of immunity.

A state defendant waives immunity when its "conduct during the litigation clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity." *Hill*, 179 F.3d at 759. An express withdrawal of the defense of sovereign immunity is incompatible with an assertion of the defense. Respondents' actions in district court therefore barred the respondents from asserting immunity on appeal.

5. The court of appeals also erred in relying on Maryland state law to hold that the state's attorneys may not waive sovereign immunity on behalf of the state. After this Court's decision in *Schacht*, this point is irrelevant. *Schacht* held that, unless a state defendant affirmatively raises the immunity defense, "a court can ignore it." 524 U.S. at 389. Ignoring the question of state sovereign immunity necessarily entails ignoring any question of whether the state's counsel is competent under state law to waive the defense. *Schacht* therefore demonstrates that the question of whether waiver has occurred is a question of federal law, not state law. *See also id.* at 397 (Kennedy, J., concurring) (stating that, notwithstanding *Ford Motor Co.*, the absence of specific state-law authorization is not an insuperable obstacle to adopting a rule of waiver).

For all these reasons, this Court should grant the writ of certiorari.

II. THE PLEADING ISSUE

Certiorari Should Be Granted So this Court May Determine the Proper Rule for Construction of Complaints Containing Both General and Specific Allegations.

Having incorrectly ruled against the petitioner on the state sovereign immunity issue, the Fourth Circuit erred again on the pleading issue. The court's decision raises an important issue regarding the correct construction of pleadings within the federal system.

In this case, petitioner's complaint adequately states a claim under the FMLA by generally alleging that, upon return from leave under the Act, petitioner was transferred to a new job that was not "the same as or substantially equivalent to" her old job, Complaint, ¶20, and in which her duties were "substantially different from and inferior to her duties and responsibilities in her former position." Complaint, ¶14. The court of appeals ignored these sufficient allegations and ruled that the case was properly dismissed because the complaint also contains specific allegations regarding the differences between petitioner's current and previous jobs that the court believed were insufficient to state a claim under the Act. The court's decision violates the fundamental principle of "notice pleading" and misconceives the rule for construction of a complaint that contains both sufficient general allegations and specific allegations that the court finds insufficient.

The court of appeals also clearly erred in holding that the complaint must be dismissed because Count I of the complaint contains an allegation that the court believed defeated the claim stated in Count II. The federal rules expressly permit a complaint to contain alternative, inconsistent allegations.

A. The Ruling of the Court of Appeals Concerns Important Issues of Federal Law

This Court has long attempted to require the lower courts to follow the "notice pleading" philosophy of the Federal Rules of Civil Procedure. Periodically, the lower courts demonstrate a preference for fact pleading requirements, heightened pleading standards, immediate dismissal of cases in which recovery by the plaintiff simply seems remote, or other deviations from the principle of notice pleading that is the animating spirit of the federal pleading rules. This Court has stepped in to set the lower courts back on the right path. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (rejecting a heightened pleading standard in cases alleging municipal liability under 42 U.S.C. § 1983); *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (holding that the rules require only notice pleading and "do not require a claimant to set out in detail the facts upon which he bases his claim").[5] It is essential to the proper implementation of the federal system of civil procedure that the lower courts follow the principle of notice pleading.

The importance of this point is underscored by this Court's grant of certiorari, this Term, in *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 23 (2001) (No. 00-1853). In that case, as in this one, the court of appeals affirmed dismissal of an employment-law complaint for failure to state a claim, notwithstanding what it should have recognized as sufficient, general allegations. The

---

[5] *See also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.")

plaintiff in *Swierkiewicz* alleged that his employer fired him because of his age and national origin. The Second Circuit affirmed dismissal of the complaint because it contained no more than "naked assertions" of discrimination. *Swierkiewicz v. Sorema, N.A.*, 2001 WL 246077, **1-2 (2d Cir. 2001). In a further parallel to this case, the court disregarded the plaintiff's general allegation of age discrimination because the specific circumstance pleaded in support of it was, in the court's view, "insufficient as a matter of law to raise an inference of discrimination." *Id.* at **2.

This Court's grant of certiorari suggests that once again the Court may find it necessary to remind the lower courts of the fundamental principle of notice pleading. The Court's decision in *Swierkiewicz* could have a strong influence on the correct decision in this case, if it reiterates that a general allegation is all that a complaint is required to contain, or that such a general allegation may not be ignored because of any supposed insufficiency of more specific, supporting allegations. Therefore, this Court should, at a minimum, hold the present case pending its decision in *Swierkiewicz*. Beyond that, the grant of certiorari in *Swierkiewicz* demonstrates the importance of the question presented by this case and suggests that the Court should grant certiorari.

B. The Decision of the Court of Appeals Conflicts with the Decisions of Other Courts of Appeals

1. The Fourth Circuit's decision to disregard the sufficient, general allegations of petitioner's complaint because of the presence of more specific and, in the court's view, insufficient allegations, conflicts in principle with decisions of other circuits. A good decision embodying the conflict is *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986).

In *American Nurses*, as in the present case, the complaint contained a general allegation and more specific allegations.

The plaintiffs generally alleged that the defendant intentionally discriminated against female employees in violation of Title VII of the Civil Rights Act of 1964. The complaint also listed certain specific, allegedly discriminatory practices. The district court dismissed the complaint because the specific allegations showed that plaintiffs' case was based on a theory of "comparable worth," which the court found to be not actionable under Title VII. *See id.* at 719, 724-26.

The Seventh Circuit reversed. It observed that plaintiffs' general allegation of intentional discrimination, "standing alone, would be quite enough to state a claim under Title VII." *Id.* at 724. The court acknowledged that "[a] plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded." *Id.* But, it explained, "a complaint cannot be dismissed merely because it includes invalid claims along with a valid one," *id.* at 724-25, and, in particular,

> the court is not to pounce on the plaintiff and by a crabbed and literal reading of the complaint strain to find that he has pleaded facts which show that his claim is not actionable, and then dismiss the complaint on the merits . . . . A complaint . . . cannot be dismissed just because one of the practices, indeed the principal practice, instanced as [unlawful] . . . is lawful.

Id. at 726-27.

In the present case, the Fourth Circuit "pounced" on the petitioner in just the manner the Seventh Circuit held to be forbidden. The general allegations of petitioner's complaint state a claim under the FMLA. Even assuming *arguendo* that her more specific allegations do not allege any unlawful practice, her complaint should not have been dismissed "merely because it includes invalid claims along with a valid one," or

merely because some of the practices instanced as unlawful are lawful, as the Seventh Circuit held in *American Nurses*.

The decision of the Fourth Circuit therefore conflicts in principle with decisions of circuits that permit a complaint to go forward on the basis of general allegations notwithstanding the failure of specific allegations. *See also Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 561-62 (9th Cir. 1974) (so allowing; "The failure of the specific allegations . . . may suggest that the plaintiffs will have difficulty in establishing their case . . . but it by no means establishes that there exists . . . 'some insuperable bar to relief.'"). A decision of the Fifth Circuit suggests that that court may support the Fourth Circuit position. *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 813 (5th Cir. 2000) (affirming Rule 12(b)(6) dismissal of complaint that generally alleged that defendant's practice had disparate racial impact because specific incidents set forth in complaint did not establish any widespread effect on members of minority groups), *cert. denied*, 531 U.S. 874 (2000). In other circuits the point may be unresolved. *See Fleming v. AT&T Information Services, Inc.*, 878 F.2d 1472, 1475 (D.C. Cir. 1989) ("we need not decide whether a complaint making sufficient general allegations may nonetheless be dismissed on the ground that the specific allegations in the complaint do not, by themselves, state a claim upon which relief can be granted").

2. With regard to the problem of the potentially inconsistent allegations in petitioner's complaint, the Fourth Circuit's opinion conflicts in principle with numerous decisions of other circuits. As other courts have specifically held, "[i]n light of the liberal pleading policy embodied in Rule 8(e)(2), ... a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case...." *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 95 (2d Cir. 1994) (quoting *Molsbergen v. United States*, 757 F.2d 1016, 1018-19

(9th Cir. 1985)) (ellipses in original). Other cases also follow this rule. *See, e.g., Rodriguez-Suris v. Montesinos*, 123 F.3d 10, 20 (1st Cir. 1997) ("Especially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading."); *Independent Enterprises Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1165, 1175 (3d Cir. 1997) ("a court may not construe [a plaintiff's] first claim as an admission against another alternative or inconsistent claim") (internal quotation omitted). The Fourth Circuit treated the allegations of Count I of petitioner's complaint as an admission against Count II, which is just what these other courts have held to be forbidden.

C. The Decision of the Court of Appeals is Incorrect.

The FMLA guarantees that, upon return from a protected leave, an employee must be restored to her previous job or to an equivalent job. 29 U.S.C. § 2614(a)(1)(A), (B). The Department of Labor's regulations interpreting the statute provide that equivalent jobs must be "virtually identical . . . in terms of pay, benefits and working conditions, including privileges, perquisites and status" and must "involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a).

The court of appeals held that petitioner insufficiently alleged that her current job is not "equivalent" to her previous job. The court's decision is incorrect.

Petitioner's complaint alleges that she took a medical leave in accordance with the FMLA and that upon return from that leave she was given a new job that is not "the same as or substantially equivalent to" her old one, Complaint, ¶20, and in which her "daily activities are substantially different from and inferior to her duties and responsibilities in her former position." Complaint, ¶14. These general allegations plainly suffice to

allege that petitioner's current job is not "equivalent" to her previous job and therefore to state a claim under the FMLA. The complaint puts respondents on fair notice of what petitioner's claim is and the grounds upon which it rests, which is all that the rules require. *See Leatherman, supra*, 507 U.S. at 168. Under the federal rules, there is no requirement that petitioner plead specific details of exactly how her current job fails to be equivalent to her previous job. *See id.* (the federal rules "do not require a claimant to set out in detail the facts upon which he bases his claim").

It is true that petitioner, although not required to do so, did plead some such details. However, there is no suggestion in the complaint that the alleged details exhaust the differences between petitioner's current and previous jobs. Therefore, the specific allegations do not limit the general allegations.

The court of appeals affirmed dismissal of petitioner's complaint because it determined that the specific details contained in the complaint did not state a claim under the FMLA, but amounted only to "de minimis" differences between petitioner's current and previous jobs, which are excluded by regulation from the Act's "equivalence" requirement. (App. 12a). This was error. Even assuming *arguendo* that the alleged details are themselves insufficient to state a claim, the general allegations must also be considered. Because the general allegations are, by themselves, plainly sufficient, the complaint cannot be dismissed under Rule 12(b)(6).[6]

---

[6] In saying this, petitioner does not concede that the specific allegations are insufficient to state a claim. In fact, these allegations reinforce petitioner's claim that her current job is not equivalent to her previous job. The main point, however, is that a complaint containing a sufficient general allegation cannot be dismissed for failure to state a claim simply because a court believes that the complaint's specific allegations are by themselves insufficient.

2. The court of appeals also clearly erred in holding that petitioner's complaint fails to state a claim because it alleges that respondents transferred her to her new position in retaliation for filing a grievance that was unrelated to her FMLA leave. This allegation is contained in the now-abandoned Count I of petitioner's complaint, which presented a different theory of relief. It is true that this allegation may be inconsistent with Count II of the complaint, which alleges a violation of the FMLA. However, the Federal Rules expressly provide that complaints may contain alternative, inconsistent allegations. *See* Fed. R. Civ. P. 8(e)(2). Count II of petitioner's complaint is therefore valid notwithstanding the presence of an alternative, possibly inconsistent allegation in Count I.

Petitioner's use of potentially inconsistent allegations is perfectly appropriate given the circumstances of the case. At this stage of the case, the reason petitioner was demoted is best known to the respondents. Petitioner is entitled to use the discovery process to learn the truth of the matter, and she is entitled to assert every theory upon which she could get relief, regardless of consistency. The court of appeals erred in holding her complaint invalid because of the possible inconsistency between the two counts of the complaint.

This Court should grant certiorari on the pleading issue. A correct ruling on this issue would permit at least part of petitioner's case to proceed regardless of the outcome on the immunity issue, because, as the court of appeals held, immunity does not bar petitioner's claim against the individual respondents for injunctive relief.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's disposition of *Lapides* and *Swierkiewicz* and then disposed of appropriately in light of the result in those cases.

Respectfully submitted,

DEBORAH A. JEON
American Civil Liberties Union Foundation of Maryland
100 North Liberty Street
Centreville, MD 21617
(410) 758-1975

ROBIN R. COCKEY
Cockey, Brennan & Maloney, P.C.
116 W. Main Street
Salisbury, MD 21801
(410) 546-1750

JONATHAN R. SIEGEL
Counsel of Record
Professor of Law
George Washington University Law School
2000 H St., N.W.
Washington, DC 20052
(202) 994-7453

JANUARY 2002